

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BILL ROMANOWSKI,

Plaintiff,

v.

RNI, LLC, et al.,

Defendants.

No. C 06-6575 PJH

**ORDER DENYING MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION AND DENYING
MOTION TO TRANSFER VENUE**

The motion of defendant Tom Incledon ("Incledon") to dismiss for lack of personal jurisdiction, and the motion of defendants RNI, LLC ("RNI") and Incledon to transfer venue to the District of Arizona came on for hearing before this court on January 31, 2007. Plaintiff Bill Romanowski appeared by his counsel Daniel R. Price, and defendants appeared by their counsel Robert Grasso, Jr. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motions as follows and for the reasons stated at the hearing.

Motion to Dismiss Defendant Incledon for Lack of Personal Jurisdiction

Defendant Tom Incledon argues that he must be dismissed from this action pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. He does not live or work in California, and he contends that he does not have sufficient contacts with California to warrant the exercise of jurisdiction over him in this state. The court finds that the motion must be DENIED. Plaintiff has provided sufficient evidence to establish a prima facie case of specific jurisdiction over Incledon in this judicial district.

When a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is proper. Rio Properties, Inc. v.

1 Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002). Where the motion is based on
2 written materials rather than on an evidentiary hearing, the plaintiff need only make a prima
3 facie showing of jurisdictional facts. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d
4 797, 800 (9th Cir. 2004). In such cases, the court need only inquire into whether the
5 plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction. Id.

6 To comport with due process, the court must consider whether Incledon has
7 sufficient "minimum contacts" with California, such that the exercise of personal jurisdiction
8 "does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v.
9 Washington, 326 U.S. 310, 316 (1945). California's long-arm statute authorizes the
10 exercise of jurisdiction on any basis not inconsistent with the state or federal Constitution.
11 Cal. Code Civ. Proc. § 410.10.

12 Personal jurisdiction over a non-resident of the forum state can be either "general" or
13 "specific." If a defendant is domiciled in the forum state, or if its activities there are
14 "substantial, continuous, and systematic," a federal court can (if permitted by the state's
15 "long arm" statute) exercise jurisdiction as to any cause of action, even if unrelated to the
16 defendant's activities within the state. Perkins v. Benguet Consolidated Mining Co., 342
17 U.S. 437, 445 (1952). This is referred to as "general jurisdiction." There is no dispute that
18 the court does not have general jurisdiction over Incledon in this case.

19 If a non-resident's contacts with the forum state are not sufficiently "continuous and
20 systematic" for general jurisdiction, that defendant may still be subject to "specific
21 jurisdiction" on claims related to its activities or contacts in the forum. A plaintiff may assert
22 specific jurisdiction over a defendant where: (1) the defendant has purposefully availed
23 himself of the benefits and protections of the forum state; (2) the claim arose directly out of
24 defendant's contacts with the forum state; and (3) the exercise of jurisdiction is reasonable.
25 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985). These requirements protect
26 non-residents from being sued in foreign courts as a result of "random, fortuitous or
27 attenuated contacts" over which they had no control." Id. If any of the three requirements
28 is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.

1 See Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006).

2 “Purposeful availment” requires that the defendant have either purposefully directed
 3 its activities at residents of the forum, or purposefully availed itself of the privilege of
 4 conducting activities within the forum state, thus invoking the benefits and protections of
 5 local law. Hanson v. Denckla, 357 U.S. 235, 253-54 (1958). True “purposeful availment” is
 6 generally applied in cases involving contract claims, while “purposeful direction” is more
 7 often used in cases involving tort claims. Schwarzenegger, 374 F. 3d at 802-03. Here,
 8 since plaintiff alleges tort claims only, the “purposeful direction” standard applies.

9 Plaintiff alleges claims with regard to two asserted wrongs – the infringement/dilution
 10 of his marks, and the conversion of e-mails on his personal laptop computer. The court
 11 finds that plaintiff has not established that Incledon purposefully directed any activities to
 12 California or residents of the state with regard to the alleged infringement/dilution.

13 The alleged infringement/dilution occurred on a website owned and operated by
 14 RNI. RNI is an Arizona limited liability company, formed by plaintiff and Incledon in May
 15 2004, and governed by an operating agreement. Plaintiff and Incledon were the only
 16 members of the LLC, and Incledon is currently the sole managing member.¹ Plaintiff’s
 17 claim that the exercise of personal jurisdiction over Incledon is proper in California is based
 18 solely on Incledon’s status as the managing member of RNI.

19 “[T]he ‘effects’ test, which is used to determine “purposeful direction,” requires that
 20 the plaintiff allege that the defendant has (1) committed an intentional act, (2) expressly
 21 aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered
 22 in the forum state.” Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002).
 23 Plaintiff argues that Incledon “caused to be published into this judicial district a commercial
 24 website and other tangible publications offending the law.” He argues that the website at
 25 issue, www.pureromonutrition.com, offers the website viewer the opportunity to purchase “a
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27 ¹ Plaintiff alleges that he “became disassociated” from RNI in August 2006. However,
 28 at the hearing on the present motion, plaintiff’s counsel stated that plaintiff remains a member
 of the LLC.

1 range of products,” including nutritional supplements and a book entitled Romo that is
2 “displayed at the website with a jacket cover showing [p]laintiff.” Plaintiff asserts that the
3 “level of commercial activity supported and promoted by the website and the obligations to
4 California residents created by sales off of the [w]ebsite” demonstrate purposeful availment.

5 The parties do not dispute that RNI is subject to personal jurisdiction in California.
6 See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417-18 (9th Cir. 1997) (courts
7 look at level of interactivity and commercial nature of exchange of information that occurs
8 on website to determine whether sufficient contacts exist to warrant the exercise of
9 jurisdiction; jurisdiction more likely to be found where website is “interactive” site that allows
10 users to exchange information with host computer). Incledon claims that the only actions
11 he has taken with regard to RNI’s website are actions in his official capacity as RNI’s
12 managing member. For his part, plaintiff has provided no evidence establishing that
13 Incledon committed any acts of trademark infringement/dilution independently of the acts
14 allegedly committed by RNI. Thus, the question is whether Incledon is subject to personal
15 jurisdiction, based solely on his status as RNI’s managing member.

16 Jurisdiction over a corporation does not necessarily mean that the court has power
17 over the entity’s nonresident officers, directors, agents or employees acting in their official
18 capacities. Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir. 1989). Incledon, a
19 managing member of RNI, argues in effect that he is protected by the fiduciary shield
20 doctrine, under which “a person’s mere association with a corporation that causes injury in
21 the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the
22 person.” Id. The court notes, however, that the corporate form does not automatically
23 shield a nonresident officer or agent who has committed tortious acts locally, simply
24 because he or she acted on behalf of the corporation. See id. at 521 (no “fiduciary shield”
25 protects corporate employees from local jurisdiction in actions in which they are otherwise
26 suable individually).

27 Here, because plaintiff has not established that Incledon purposefully directed
28 activities toward plaintiff, a resident of the state, with regard to the alleged

1 infringement/dilution of plaintiff's marks, the court finds that Incledon's mere status as RNI's
2 managing member is not sufficient to permit jurisdiction to be asserted over him as to those
3 claims.² See also Colt Studio, Inc. v. Badpuppy Enter., 75 F.Supp. 2d 1104, 1111 (C.D.
4 Cal. 1999) (acts of corporate officers and directors in their official capacities are acts of the
5 corporation exclusively, and thus not material for purposes of establishing minimum
6 contacts as to the individual officer or director).

7 By contrast, with regard to the computer fraud/conversion causes of action, it is
8 Incledon's alleged wrongdoing that is at issue. While Incledon was plainly acting on RNI's
9 behalf in connection with any activities involving the use of the "ROMO marks" on RNI's
10 website – the intended function of which is to sell RNI's nutritional supplements – it is not
11 so clear that he was acting for RNI when he allegedly set up plaintiff's laptop computer so
12 that any e-mail directed to or originating from plaintiff would also be directed to RNI's
13 server. The alleged manipulation of plaintiff's computer was unrelated to RNI's business
14 purpose (the marketing and sale of nutritional supplements), and Incledon cannot rely on
15 the fiduciary shield doctrine as to the computer-related causes of action.

16 The second requirement for specific jurisdiction is that the plaintiff's claim must arise
17 out of the defendant's forum-related activities. The Ninth Circuit applies a "but-for" test to
18 determine whether a particular claim arises out of or is related to forum-related activities.
19 Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995); see also Glencore Grain Rotterdam
20 B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123 (9th Cir. 2002).

21 Here, plaintiff has not established that the infringement/dilution claims arise out of
22 Incledon's forum-related activities. As noted above, plaintiff has not established that
23 Incledon engaged in any activity in California in connection with the alleged
24 infringement/dilution. With regard to the computer fraud/conversion claims, however,
25 plaintiff has alleged, and has arguably established by means of declarations, that Incledon,

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27 ² This is intended as a finding with regard to the question whether plaintiff has
28 established a prima facie case of personal jurisdiction. The court is not making a final
determination under the fiduciary shield doctrine that Incledon is not liable under the alleged
infringement/dilution claims.

1 while at plaintiff's California residence, set up plaintiff's computer so that all plaintiff's
2 e-mails would be directed to the RNI server. It is true that Incledon denies these
3 allegations, asserting in a declaration that any work he did on plaintiff's computer was
4 performed in Arizona. Nevertheless, in ruling on a motion to dismiss for lack of personal
5 jurisdiction, the court must resolve conflicts contained in affidavits in favor of the plaintiff.
6 See Schwarzenegger, 374 F.3d at 800.

7 Once a plaintiff has satisfied the first two factors, as plaintiff has done here with
8 regard to the computer fraud/conversion claims, the burden shifts to the defendant to
9 overcome a presumption that jurisdiction is reasonable by presenting a compelling case
10 that specific jurisdiction would be unreasonable under the circumstances. Panavision Int'l,
11 L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998) (citing Burger King, 471 U.S. at
12 476-77).

13 In the Ninth Circuit, courts must balance seven factors to determine reasonableness
14 – the extent of the defendant's purposeful availment, the burden on the defendant to litigate
15 in the forum, the extent of conflict with the defendant's sovereign state, the forum's interest
16 in hearing the dispute, the most efficient means of resolving the controversy, the
17 importance to the plaintiff of a convenient forum and effective relief, and the existence of an
18 alternative forum. Ballard, 65 F.3d at 1500-02.

19 The court finds that Incledon has not met his burden of showing that the
20 reasonableness factors weigh against personal jurisdiction. First, the extent of Incledon's
21 purposeful availment is somewhat limited, so that factor favors Incledon, though only
22 slightly. Second, the burden on Incledon of litigating in California will be no greater than
23 would be the burden on plaintiff of litigating in Arizona, so that factor is neutral. Third, the
24 parties have identified no conflict between California and Arizona, so that factor is also
25 neutral. Fourth, California has a strong interest in hearing the dispute, because of all the
26 California statutory claims (Incledon's argument to the contrary). Fifth, it would be no more
27 efficient to resolve the controversy in Arizona than in California, so this factor is neutral.
28 Sixth, it is important to plaintiff to have the dispute resolved in California, so that factor

1 favors plaintiff. Seventh, Arizona is a viable alternative forum, but not particularly
2 preferable to California.

3 Accordingly, based on the determination that personal jurisdiction is proper with
4 regard to the computer fraud/conversion claims, the court finds that the motion to dismiss
5 must be DENIED. The court notes, however, that Incledon may raise this issue again in a
6 dispositive motion, or at trial, if he has evidence sufficient to show that the alleged
7 manipulation of plaintiff's computer did not occur in California.

8 Where a court denies a motion to dismiss for lack of personal jurisdiction, the case
9 may proceed to trial without any waiver of the jurisdictional challenge. Stewart v. Ragland,
10 934 F.2d 1033, 1036 n.5 (9th Cir. 1991). If the defendant again contests the plaintiff's
11 prima facie showing (at a later evidentiary hearing or at trial) plaintiff will be required to
12 prove the existence of minimum contacts by a preponderance of the evidence. Rano v.
13 Sipa Press, Inc., 987 F.2d 580, 587 n.3 (9th Cir. 1993); see also Data Disc, Inc. v. Systems
14 Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977); Schwarzer, Tashima &
15 Wagstaffe, Federal Civil Procedure Before Trial (2006) § 9:119. Thus, depending on the
16 outcome of the dispute regarding the extent of Incledon's forum-based activities –
17 specifically, whether the computer manipulation occurred; and if it did occur, where it
18 occurred – the possibility exists that Incledon may at some future point be dismissed from
19 this action for lack of personal jurisdiction.

20 Motion to Transfer Venue

21 Defendants argue that the court should transfer this case to the District of Arizona.
22 The court finds that the motion must be DENIED. Defendants have not met their burden of
23 showing that transfer is warranted under 28 U.S.C. § 1404(a).

24 Under § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of
25 justice, a district court may transfer any civil action to any other district or division where it
26 might have been brought." 28 U.S.C. § 1404(a). Under this provision, the district court has
27 discretion to adjudicate motions to transfer based on an individualized, case-by-case
28 consideration of convenience and fairness. Stewart Organization, Inc. v. Ricoh Corp., 487

1 U.S. 22, 29 (1988), cited in Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir.
2 2000).

3 Defendants bear the burden of showing that transfer is proper. Defendants have
4 established the first requirement under § 1404(a) – that the District of Arizona is one in
5 which the action might have been brought originally. Under 28 U.S.C. § 1391(b)(1), which
6 provides that in cases not based on diversity of citizenship, venue is proper in a judicial
7 district where any defendant resides, if all defendants reside in the same state, venue is
8 proper in the District of Arizona because both defendants reside there.

9 However, there is a second requirement under § 1404(a): Defendants also bear the
10 burden of showing that the balance of conveniences weighs heavily in favor of the transfer
11 in order to overcome the strong presumption in favor of the plaintiff's choice of forum. See
12 Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986); see also
13 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981). Defendants have not made a
14 strong showing that transfer to the District of Arizona would benefit the parties and the
15 witnesses, or that the interests of justice warrant transfer.

16 In considering the balance of conveniences, the court employs a case-by-case
17 analysis, which may include evaluation of the following factors: 1) the location where the
18 relevant documents were negotiated and executed; 2) the state most familiar with the
19 governing law (in order to avoid confusion with application of foreign law); 3) plaintiff's
20 choice of forum; 4) the parties' contacts with the forum and the connection between
21 plaintiff's cause of action and the chosen forum; 5) the differences in the costs of litigation
22 in the two forums and congestion of the courts; 6) the ability to compel attendance of
23 unwilling non-party witnesses; 7) the ease of access to sources of proof and the
24 convenience of the witnesses; 8) the relevant public policy of the forum state and whether
25 there is a local interest in having localized controversies decided at home; and 9) the
26 unfairness of imposing jury duty on citizens in a forum unrelated to the action. Jones, 211
27 F.3d at 498-99.

28 In the present case, with regard to the first factor – the location where the relevant

1 documents were negotiated and executed – defendant has not established the existence of
2 any documents relevant to the claims asserted by plaintiff in this action. Contrary to
3 defendants' argument, the existence and interpretation of the RNI operating agreement
4 does not appear to be directly at issue in this case. And even if the operating agreement
5 were at issue, defendants have provided no evidence regarding the location where it was
6 negotiated and executed.

7 With regard to the second factor – the state most familiar with the governing law (in
8 order to avoid confusion with application of foreign law) – defendants have not established
9 that Arizona is more familiar with the law underlying the causes of action alleged in the
10 complaint. The complaint asserts twelve causes of action – four under federal statutory
11 law, four under California statutory law, and four under common law. As stated above,
12 defendants have not established that the RNI operating agreement is at issue in this case.
13 Thus, the court does not accept defendants' argument that because the RNI operating
14 agreement provides that the agreement shall be construed in accordance with Arizona law,
15 the claims under federal and California statutory law can be considered only under Arizona
16 law. The court finds that California is more familiar with the governing law than is Arizona.

17 With regard to the third factor – plaintiff's choice of forum – the court find that this
18 factor favors plaintiff. Plaintiff's choice of forum is always accorded substantial weight, and
19 a court will not grant a motion under § 1404(a) unless the defendant makes a strong
20 showing of inconvenience. See Decker, 805 F.2d at 843; see also Creative Tech., Ltd.
21 v. Aztech Sys. Pte., Ltd., 61 F.3d 696, 703 (9th Cir. 1995) ("there is normally a strong
22 presumption in favor of honoring the plaintiff's choice of forum"). Defendants have not
23 made this showing.

24 With regard to the fourth factor – the parties' contacts with the forum and the
25 connection between plaintiff's cause of action and the chosen forum – the court finds that
26 this factor favors neither side. Defendants have established that Incledon is a resident of
27 Arizona, who manages two businesses in that state, and that RNI is an Arizona limited
28 liability company, which has limited contacts with California. RNI's only real contacts with

1 California appear to be based on RNI's operation of a website through which RNI sells
2 nutritional supplements to individuals throughout the country, including California.
3 Defendants have not established that plaintiff has any significant contacts with Arizona.
4 The court finds that defendants have not established that this factor strongly favors
5 defendants.

6 With regard to the fifth factor – the differences in the costs of litigation in the two
7 forums and congestion of the courts – the court finds that this factor favors neither side.
8 Defendants have made no showing regarding the relative congestion of the courts in the
9 two states, and it appears that either side will incur costs if the litigation goes forward in the
10 other side's state.

11 With regard to the sixth factor – the ability to compel attendance of unwilling non-
12 party witnesses – defendants make no argument.

13 With regard to the seventh factor – the ease of access to sources of proof and the
14 convenience of the witnesses – the court finds that defendants have not met their burden,
15 as they have not identified any sources of proof, and have identified only one witness by
16 name. Nor have they stated in any detail what testimony they expect from their witnesses.
17 The convenience of the witnesses is often the most important factor when determining
18 which forum would be the most convenient. See Florens Container v. Cho Yang Shipping,
19 245 F.Supp. 2d 1086, 1092 (N.D. Cal. 2002) (citing 15 Wright, Miller & Cooper, Federal
20 Practice and Procedure: Jurisdiction § 3851).

21 Here, however, defendants have provided only minimal evidence showing that it
22 would be inconvenient for their witnesses to appear in a California action, because they
23 have provided little information about their witnesses. They have argued that Incledon
24 would be inconvenienced if he had to travel to California, but Incledon is a party, not a
25 witness.³ On the other hand, plaintiff has similarly not identified any witnesses other than
26 the attendees at the July 2006 meeting at plaintiff's California home. As to those
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28 ³ However, the convenience of parties is also a factor under § 1404(a).

witnesses, he has provided no information regarding state of residence and no evidence establishing that it would be inconvenient for those witnesses to appear in an Arizona court.

With regard to the eighth factor – the relevant public policy of the forum state and whether there is a local interest in having localized controversies decided at home – defendants have not identified any relevant public policy, other than the policy of each state to protect the interests of its own citizens.

With regard to the ninth factor – the unfairness of imposing jury duty on citizens in a forum unrelated to the action – defendants have not established that transfer is warranted. The complaint does not allege any causes of action under Arizona law, and defendants have not established that the RNI operating agreement (which provides that Arizona law will control “the conduct of” RNI affairs and the relationship between the members of RNI and the LLC as well as the relationship of the members to each other) is at issue in any of the causes of action alleged in the complaint.

The court is dismayed at the expenditure of judicial resources necessitated by the fact that two separate cases arising out of the failed business relationship between Mr. Romanowski and Mr. Incledon are now pending in two separate federal judicial districts. Nevertheless, the court finds that the motion to transfer the present action to the District of Arizona should be DENIED because defendants have not met their burden of showing that the convenience of the parties and the witnesses, and the interests of justice, favor transfer, and because the present action was filed first, in the judicial district that is plaintiff’s choice of forum.

IT IS SO ORDERED.

Dated: January 31, 2007



PHYLLIS J. HAMILTON
United States District Judge